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In The Supreme Court of the United States

October Term, 1978

ACKERMAN-CHILLINGWORTH,
Division of MARSH & McLENNAN, INCORPORATED,
a Delaware corporation, *et al.*,

Petitioners,

v.

PACIFIC ELECTRICAL CONTRACTORS
ASSOCIATION, a Hawaii corporation, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 78—

ACKERMAN-CHILLINGWORTH, Division of MARSH & McLENNAN, INCORPORATED, a Delaware corporation, *et al.*,

Petitioners,

vs.

PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, a Hawaii non-profit corporation, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on March 22, 1978, with rehearing denied on July 31, 1978. Petitioners are the insurance agents and agencies named in Footnote 1 and re-

[1] Ackerman-Chillingworth, Division of Marsh & McLennan, Incorporated, a Delaware corporation; Alexander of Hawaii, Inc., dba Mid-Pacific Insurance Division, a Hawaii corporation; American Mutual Underwriters, Ltd., a Hawaii corporation; Bayly, Martin & Fay of Hawaii, Inc., a Hawaii corporation; Davies Insurance Agencies, Inc., a Hawaii corporation; Stanley S. Hashimoto; Occidental Underwriters of Hawaii, Ltd., a Hawaii corporation; Jack T. Osakoda and Raymond T. Tanaka.

spondents are the individuals, trade association and labor union named in Footnote 2.

OPINIONS BELOW

The Opinion of the District Court for the District of Hawaii is reported at 405 F. Supp. 99 (1975) and is printed as Appendix B hereto. The Opinion of the Court of Appeals for the Ninth Circuit is not yet reported and is printed as Appendix A hereto. The Order denying rehearing is likewise not yet reported and is printed here as Appendix C.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Ninth Circuit was entered on March 22, 1978. A timely Petition for Rehearing was denied on July 31, 1978. This Court has jurisdiction to grant a Writ of Certiorari under 28 U.S.C. §§ 1254 and 2101, and under Rule 21 of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether a collective bargaining agreement between a trade association and a labor union mandating that all trade association members and non-member electrical contractors bound by that agreement must participate in a group workers' compensation insurance plan is a *per se* violation of the Sherman Act, 15 U.S.C. § 1, when combined with an agreement or understanding that all member and non-member electrical contractors must utilize the exclusive services of the trade association's executive secretary as their insurance agent or solicitor, thereby precluding the electrical contractors from doing business or continuing to do business with petitioners.

2. Whether respondents' conduct, if not illegal *per se* as a concerted refusal to deal, is nevertheless an unreasonable restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1.

3. Whether respondents' agreement to refuse to deal with petitioners and to compel others to do likewise can be saved by an allegedly benign motivation.

4. Whether respondents' alleged motivation, even if a relevant question, can properly be adjudicated on a motion for summary judgment, where controverted by competent evidence.

[2]Pacific Electrical Contractors Association, a Hawaii non-profit corporation; International Brotherhood of Electrical Workers, Local No. 1186; Walter T. Oda and Akito Fujikawa. Petitioners do not seek review of the Ninth Circuit's decision as to two of the original defendants in this action, Insurance Company of North America ("INA") and Pacific Employers Insurance Company ("PEIC"), and accordingly, those parties are not respondents herein.

STATUTES AND RULES INVOLVED

This case involves Section 1 of the Sherman Act, 15 U.S.C. § 1, and Rule 56(c) of the Federal Rules of Civil Procedure, both of which are set forth in Appendix D.

STATEMENT OF THE CASE

A civil antitrust action was filed by petitioners on September 6, 1974 in federal district court pursuant to 15 U.S.C. §§ 15 and 25, seeking treble damages and injunctive relief under the Sherman and Clayton Acts. Petitioners' complaint also sought damages for violations of the National Labor Relations Act, 29 U.S.C. §§ 158(b) (4) (ii) and 158(e).

Petitioners moved for summary judgment on the grounds that the undisputed facts presented a *per se* violation of the Sherman Act as well as a violation of the National Labor Relations Act. Respondents cross-moved for summary judgment asserting that the undisputed facts presented no violations of either Act, whether *per se* or otherwise.

The district court granted respondents' motion for summary judgment on all counts of petitioners' complaint. Petitioners thereafter appealed to the Ninth Circuit solely on the antitrust issues, pursuant to 28 U.S.C. § 1292(a) (1). The Ninth Circuit affirmed the district court's award of summary judgment in respondents' favor over a vigorous and incisive dissent by Circuit Judge Shirley M. Hufstedler.

Petitioners are insurance agents and solicitors engaged in the business of selling workers' compensation insurance in Hawaii. Respondent Pacific Electrical Contractors Association ("PECA") is a trade association composed of approxi-

mately 63 electrical contractors. Respondent Walter T. Oda ("Oda") is PECA's executive secretary. Respondent International Brotherhood of Electrical Workers, Local No. 1186 ("IBEW") is a labor organization engaged in collective bargaining with PECA. Respondent Akito Fujikawa ("Fujikawa") is IBEW's business agent. In addition to its 63 member contractors, PECA also represents approximately 65 non-member electrical contractors who employ IBEW personnel. All 128 contractors are bound by the terms of the PECA-IBEW collective bargaining agreement.

Prior to the formation of the mandatory group insurance plan challenged by petitioners, the 128 electrical contractors represented by PECA purchased their workers' compensation insurance from approximately 22 different insurance carriers through approximately 20 competing insurance agents and solicitors, including petitioners. This competition has been eliminated by the challenged agreement.

In May 1973, Fujikawa, representing IBEW, proposed to PECA that all electrical contractors bound by the PECA-IBEW labor agreement combine their workers' compensation insurance through a single insurance carrier or through a Taft-Hartley trust fund.[3] Fujikawa's stated purpose in making this proposal was two-fold: (1) to improve claims processing and benefits to its workers, and (2) to assist PECA financially by allowing PECA to manage the proposed plan and thereby derive needed revenues. It was Fujikawa's expressed interest in PECA's financial situation which caused the district court to rule that the resulting amendment to the collective bargaining agreement was not immunized from antitrust scrutiny by federal labor law or policy.[4] The district court's ruling on this point, although contested by IBEW, was not disturbed on appeal.[5]

[3]The Taft-Hartley trust approach was later abandoned as unworkable.

[4]Appendix B at 22-23; 405 F. Supp. at 113.

[5]Although the district court expressly found that IBEW's purpose was "unmistakably tainted" under this Court's rulings in *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945) and *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), neither of the courts below found this "tainted purpose" relevant to their antitrust analysis, notwithstanding their apparent focus on "intent."

Although PECA was initially reluctant to adopt Fujikawa's proposal, its interest perked when apprised of the substantial revenues to be derived thereby. PECA's interest originally focused on the potential dividends which might be paid by the insurance carrier, which could be used to offset PECA dues, "with the inference," according to Oda, "that non-members would be forfeiting their dividends." Later, concluding that dividends were an unstable and speculative source of income, Oda devised an alternative plan to generate revenue for PECA. In return for being designated as the agent for the plan, Oda pledged to rebate his net commissions to PECA.

Oda's appointment as exclusive agent[6] for the group plan and his promised rebates to PECA were not made part of the formal amendment to the collective bargaining agreement; they were, nevertheless, an integral part of respondents' agreement as implemented. Article XIX to the PECA-IBEW labor agreement merely provides that all contractors bound by the labor agreement must participate in the group dividend plan which "will be administered by PECA."

The evidence presented to the district court, including minutes of respondents' various meetings and conferences, was not accepted in its entirety by the district court or the Ninth Circuit. However, both courts were forced to assume, at least for purposes of summary judgment, that "a majority of the PECA-member contractors and Oda agreed that henceforth the contractors would purchase insurance only through Oda, compelling all signatory contractors to the collective bargaining agreement to do likewise."[7]

Petitioners assert that this agreement, which, by its terms, deprived the non-member contractors of their freedom to deal with an agent of their choice and foreclosed a large segment of the Hawaii insurance market from competition by petitioners, is *per se* unlawful as a group boycott under this Court's rulings in *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and *Fashion Originators' Guild v.*

[6]A "closed" plan in insurance terminology.

[7]Appendix A at 12, n. 8. *See also* 405 F. Supp. at 111.

FTC, 312 U.S. 457 (1941).

The Ninth Circuit, disregarding the teachings of these cases and relying instead on its own decision in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (1969), *cert. denied* 396 U.S. 1062 (1970), *reh. denied* 397 U.S. 1003 (1970), ruled that respondents' conduct was lawful because, "PECA, Oda and the contractors agreed to deal with Oda alone, not to improve Oda's competitive position as an insurance solicitor but to aid PECA and to improve the quality of the contractors' insurance plan."[8]

In a well-reasoned dissent, Judge Hufstedler explained that:

> PECA was not just a trade association, nor was Oda simply a trade association's executive secretary. . . . Oda was an insurance solicitor selling INA/PEIC workmen's compensation policies to 114 of the 128 electrical contractors. PECA, as recipient of Oda's commissions, in a very real sense was in the insurance agency business. (Appendix A, dissent at 23).
>
> * * *
>
> Once it is recognized that, through Oda, PECA was in the insurance sales' business, the resemblance of this arrangement to the classic vertical boycott model emerges. (*Id.* at 24).

Judge Hufstedler further noted that the majority opinion completely ignored the affidavits submitted by INA specifically stating that the exclusive use of a single agent was unnecessary to derive the legitimate benefits of a group insurance program.[9]

[8] Appendix A at 10, n. 7.

[9] "It is obvious that all of the insurance for a safety group must be written by a single insurance company. However, there is no requirement that all of the insurance be written through a single insurance agent . . . ." Affidavit of Edmond Rondepierre, Associate General Counsel of INA, Record on Appeal at 907-08.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS IMPORTANT QUESTIONS CONCERNING THE CONTINUED VIABILITY OF THE SUPREME COURT'S ANNOUNCED POLICY OF HOLDING GROUP BOYCOTTS *PER SE* VIOLATIONS OF THE SHERMAN ACT.

A. This case presents a unique opportunity to clarify the law of group boycotts and the application of the *per se* rule.

Although apparently not convinced by petitioners' proof, the Ninth Circuit's opinion nevertheless assumed an exclusionary conspiracy with both vertical[10] and horizontal[11] aspects which was forced upon the non-member contractors through the mandatory nature of the PECA-IBEW collective bargaining agreement:

> In this summary proceeding the District Court, despite the dearth of evidence, assumed that a majority of the PECA-member contractors and Oda agreed that henceforth the contractors would purchase insurance only through Oda, compelling all signatory contractors to the collective bargaining agreement to do likewise. 405 F. Supp. at 111. In light of the factors discussed below, this assumption would not lead to a different result in our application of the standard of reasonableness. (Appendix A at 12, n. 8).

The issue presented to this Court is simply: Can such an agreement, which on its face precludes petitioners from doing business with both the conspiring PECA members and the 68 non-member contractors bound by respondents' labor agreement, be saved by an allegedly benign purpose "to aid PECA

[10] The vertical agreement is among Oda/PECA as insurance agent, the PECA members as insurance purchasers, and IBEW/Fujikawa as representative of the insurance beneficiaries. IBEW/Fujikawa's "tainted" intent to produce revenues for PECA was not disputed by the Ninth Circuit; it was simply ignored.

[11] The horizontal aspect is the agreement among the PECA contractors to use Oda exclusively and to compel the non-PECA contractors to do likewise.

and to improve the quality of the contractors' insurance"?

Petitioners submit that while proof of exclusionary or coercive intent may itself be sufficient to invoke the application of the *per se* rule when coupled with proof of conspiracy and acts in furtherance thereof, the converse cannot be true; *i.e.*, the alleged absence of anticompetitive intent cannot save a combination or conspiracy which by its terms compels the conspirators and others to cease business relations with strangers to the group.[12]

B. The decision below is in direct conflict with Supreme Court decisions holding group boycotts to be *per se* violations of the Sherman Act.

This Court has consistently ruled for over 70 years that group boycotts and concerted refusals to deal are *per se* violations of the Sherman Act.[13] The rationale underlying the adoption of the *per se* rule is well-stated in *Klor's*. In condemning Broadway-Hale's solicitation of agreements from its suppliers not to deal with its competitor, this Court stated:

> This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. (359 U.S. at 213).

Commenting on the *Klor's* holding in *General Motors*, this Court noted:

> This was not new doctrine, for it had long been recognized that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and that group boycotts are of this character. (384 U.S. at 146).

The instant case presented the Ninth Circuit with a factual situation not unlike that in *Klor's*, with the added dimension of a trade association-labor union contract and its intimidating effect on the trade association's non-member contractors. To paraphrase the language of *Klor's*, this combination took from petitioners their freedom to solicit insurance business in an open market, and effectively drove petitioners out of the contractors' workers' compensation market. It deprived the contractors, particularly the non-PECA member contractors who derive no benefit from Oda's rebate of net commissions to PECA, of their freedom to purchase workers' compensation insurance through an agent of their own choice.

Despite the clarity of this Court's earlier instructions to the lower federal courts, and particularly the Ninth Circuit in *Klor's*, *General Motors* and *Radovich v. National Football League*, 352 U.S. 445 (1957),[14] the Ninth Circuit again came to its "own philosophical conclusions as to what restraints of trade should be prohibited."[15] Relying primarily on its often-criticized decision in *Hawaiian Oke*,[16] the Ninth Circuit held there was not even a triable issue of fact under the "rule of reason," let alone a *per se* violation of the Sherman Act because, in its view, respondents' conspiracy was primarily motivated by a legitimate economic purpose.

Relying on the same kind of reasoning that found Broadway-Hale's boycott of Klor's "no more than a squabble . . . by which the 'public' could [not] conceivably suffer

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[12] *See*, Horsley, *Per Se Illegality and Concerted Refusals to Deal*, 13 B.C. IND. & COM. L. REV. 484 (1972); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 NW. U.L. REV. 818 (1977).

[13] *See e.g.*, *Eastern States Retail Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

[14] In reversing the Ninth Circuit's dismissal of Radovich's boycott allegations, this Court bluntly warned: "*The law is its own measure of right and wrong* . . . , and *the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of the parties . . . ." (*Id.* at 454, n. 10) (Emphasis in original).

[15] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 228 (9th Cir. 1958).

[16] *See, e.g.*, Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1974); Note, *A Return to the Rule of Reason in Group Boycott Cases?*, 42 U. COLO. L. REV. 467 (1971).

injury,"[17] the Ninth Circuit affirmed summary judgment against petitioners.

C. The decision below misstates the role of respondents' alleged "purpose" to even a rule of reason analysis.

In deciding this case on the basis of respondents' alleged motivation, the Ninth Circuit not only disregarded the blunt and emphatic pronouncements of this Court in group boycott cases,[18] but even misinterpreted the role of "purpose" to the rule of reason approach.

As Justice Brandeis explained in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), "purpose" is a relevant factor in rule of reason analysis, "not because a good intention will save an otherwise objectionable [restraint], or the reverse; but because knowledge of intent may help the court to predict consequences."

Justice Brandeis' point, obviously lost on the Ninth Circuit, was recently crystallized by Justice Stevens in *National Society of Professional Engineers v. United States*, 98 S. Ct. 1355, 1363 (1978):

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

The application of Justice Brandeis' comments to group boycotts is likewise succinctly stated in a recent commentary, Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773, 790-91 (1974):

> Whether or not the boycotter who excludes another from the market has good or evil intentions is of little significance to the victim or the consumer, or to the fair or efficient manufacture and distribution of goods. It makes no sense for an economic regulatory statute to hinge its regulation on the subjective state of mind of the wrongdoer if its goal is to preserve access to the market or intensity of competition.[19]

[17] 255 F.2d at 235.

[18] "In its unanimous decision in Klor's the Supreme Court rather bluntly and emphatically informed the lower courts that when in the past it proclaimed the per se unlawfulness of group boycotts, it meant precisely what it said. The prohibition is absolute. There are to be no exceptions, however extenuating may be the conditions generating the boycott." Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843, 862 (1959).

D. Review is required to prevent confusing and inequitable application of the *per se* rule in the lower courts.

The Ninth Circuit's 1969 decision in *Hawaiian Oke*, while perhaps defensible if limited to its particular facts,[20] has over the past decade spawned a mutitude of irreconcilable lower court decisions avoiding, in various ways, the unqualified instructions of this Court that group boycotts are *per se* offensive to the policies of the Sherman Act.

The Ninth Circuit has recently signified its intention to decide such cases entirely on a "rule of reason" analysis. *See, e.g., Mutual Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied* 423 U.S. 1053 (1976); *Alpha Distributing Co. v. Jack Daniel Distillery*, 454 F.2d 443 (9th Cir. 1972), *cert. denied* 419 U.S. 842 (1974). In the last cited case the Ninth Circuit specifically stated:

> The critical inquiry in such "refusal to deal" cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or

[19] *See also*, Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 Duke L.J. 247, 289, reaching the same conclusion for a somewhat different reason: "[O]ne of the reasons urging adoption of a per se rule was the difficulty in isolating the 'real' purpose motivating a certain action."

[20] Several commentators have viewed *Hawaiian Oke* as involving no more than a switch in distributors, arguing that the effect of the defendants' agreement was merely to replace one exclusive distributor with another, the number of distributors in the market thereby remaining constant. These commentators suggest that without any evidence of anticompetitive effect, the application of the *per se* rule may properly depend upon whether the defendants were motivated by an anticompetitive intent. *See* Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 NW. U. L. REV. 818, 826 (1977); Horsley, *Per Se Illegality and Concerted Refusals to Deal*, 13 B.C. IND. & COM. L. REV. 484, 498-99 (1972); L. Sullivan, *Antitrust* § 90 at 258-59 (1977).

conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade. (454 F.2d at 452).

Relying to a large extent on the *Hawaiian Oke* decision, and the pre-*Klor's* law review article on which it was based,[21] the Third, Fifth, Sixth and Eighth Circuits[22] have recently required, as a prerequisite to the application of this Court's *per se* doctrine, proof of the complex issue of defendant's purpose or motivation, as well as proof of exclusionary effect or public injury—precisely the questions which the *per se* doctrine was designed to avoid.[23]

This situation, at the very least, has created confusion in the law. The proliferation of commentaries attempting to explain these decisions have only added to the confusion. This point is perhaps best made by the district court's opinion in *Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Ass'n*, 436 F. Supp. 418, 428-29 (D.S.C. 1976) *aff'd* 569 F.2d 821 (4th Cir. 1978):

> Despite pronouncements of the Supreme Court, a multitude of lower courts have continued to evaluate alleged boycotts under a "rule of reason" analysis rather than by the per se doctrine employed by the Supreme Court in the aforementioned cases. As one commentator has observed, "the law in Washington, however, is quite different from the law in the rest of the country." Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773 (1974). The article cited above catalogs and discusses a large collection of lower court decisions which employ various theories to qualify the per se rule; these cases, however, involve many factual situations which might arguably appear to fall well within the category of boycotts which the Supreme Court would consider per se illegal. This apparent dichotomy between the Supreme Court and lower court views of the law applicable to group boycotts has prompted many other articles as well. [Citations omitted]. These sources contain numerous citations to decisions in which lower courts, in one way or another, have declined to adhere to the application of a per se rule of illegality in cases involving allegations of group boycotts. Reported decisions also indicate that this trend has continued since the publication of the most recent of the articles cited above [1974]. While a discussion of all of these decisions might not prove to be a totally impossible undertaking, it would certainly be fruitless to attempt to reconcile the various approaches taken therein. *To state that the law concerning group boycotts and Section 1 of the Sherman Act lacks consistency would be to understate the truth by a wide margin.* (Emphasis supplied).

It is respectfully submitted that this admitted confusion in the lower federal courts requires clarification by this Court.

[21] Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

[22] *See DeFilippo v. Ford Motor Co.*, 516 F.2d 1313 (3rd Cir. 1975), *cert. denied* 423 U.S. 912 (1975); *E. A. McQuade Tours, Inc. v. Consol. Air Tour Manual Comm.*, 467 F.2d 178 (5th Cir. 1972), *cert. denied* 409 U.S. 1109 (1973); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975), *cert. denied* 424 U.S. 934 (1976); *Worthen Bank & Trust Co. v. National BankAmerica, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied* 415 U.S. 918 (1974); *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972), *cert. denied* 409 U.S. 1001 (1972).

[23] Not all of the Circuits have, however, adopted the broad limitations of *Hawaiian Oke*. Most notably, the Second Circuit appears to have confined *Hawaiian Oke* to its facts. *See Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade*, 539 F.2d 907 (2nd Cir. 1976).

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS HOLDING SUMMARY PROCEDURES INAPPROPRIATE IN COMPLEX ANTITRUST LITIGATION WHERE MOTIVE AND INTENT PLAY SIGNIFICANT ROLES.

In addition to the substantive antitrust issues, this case presents the additional question of whether an adjudication based ultimately on respondents' alleged motivation, even if relevant in group boycott cases, can properly be made on a motion for summary judgment, particularly when the alleged

motivation is refuted by counter-affidavits.[24] The most basic requirement of Fed. R. Civ. P. 56(c), that there be an absence of any "genuine issue as to any material fact," appears to prohibit such an adjudication.

The lower federal courts have repeatedly held, in a variety of contexts, that summary judgment is not a proper vehicle for resolution of disputes involving motivation or intent or "concerning state of mind and conflicting interpretations of perceived events."[25] This is particularly true "when [the] essential facts are solely within the control of the moving party."[26]

This Court has itself cautioned the lower federal courts on several occasions that, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."[27]

III.

THE DECISIONS BELOW, BY SANCTIONING RESPONDENTS' USE OF A LABOR AGREEMENT TO ENHANCE THE COMPETITIVE STATUS OF ODA AND PECA, HAVE CREATED A DANGEROUS PRECEDENT WITH APPLICATIONS FAR BEYOND THE INSTANT CASE.

Although the district court expressly found that IBEW's stated purpose to assist PECA financially was "unmistakably tainted" for purposes of the labor exemption, both of the courts below relied on this very purpose to immunize the ensuing labor and non-labor agreements from the antitrust laws. The decisions below are not only illogical in this respect, but have, in effect, created a precedent explicitly permitting a labor agreement to be used to enhance the competitive status of a non-labor group at the expense of its competitors in the marketplace.

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[24] *See* note 10, *supra* at 7.

[25] *Schmidt v. McKay*, 555 F.2d 30, 37 (2nd Cir. 1977); *Accord, Staren v. American Nat'l Bank & Trust Co.*, 529 F.2d 1257 (7th Cir. 1976).

[26] *Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C.Cir. 1977).

[27] *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Norfolk Monument Co. v. Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969).

Unless the Court of Appeals is reversed, its decision will serve as an open invitation to others engaged in collective bargaining to create similar anticompetitive schemes utilizing the collective bargaining process to obtain a powerful advantage over their competitors. Extension of the practices condoned by the Court of Appeals will not only affect the livelihood of many thousands of insurance agents and reduce the services they provide to the insurance consumer, but will dramatically and adversely affect every other trade or business desiring to deal with those bound by a labor agreement.

CONCLUSION

The importance of the questions presented, the admitted confusion in the lower courts and the inherently anticompetitive effect of respondents' scheme require this Court's review.

For the reasons stated above, petitioners urge this Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

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